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 Holders of USA Capital First Trust Deed Fund, LLC*

**UNITED STATES BANKRUPTCY COURT  
 DISTRICT OF NEVADA**

In re:  
 USA COMMERCIAL MORTGAGE COMPANY,  
 Debtor.

) BK-S-06-10725-LBR  
 Chapter 11

In re:  
 USA CAPITAL REALTY ADVISORS, LLC,  
 Debtor.

) BK-S-06-10726-LBR  
 Chapter 11

In re:  
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,  
 Debtor.

) BK-S-06-10727-LBR  
 Chapter 11

In re:  
 USA CAPITAL FIRST TRUST DEED FUND, LLC,  
 Debtor.

) BK-S-06-10728-LBR  
 Chapter 11

In re:  
 USA SECURITIES, LLC,  
 Debtor.

) BK-S-06-10729-LBR  
 Chapter 11

Affects

- ☐ All Debtors  
☐ USA Commercial Mortgage Co.  
☐ USA Securities, LLC  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed  
☒ USA First Trust Deed Fund, LLC

) Date: January 31, 2007  
 Time: 9:30 a.m.

**JOINDER AND STATEMENT BY THE OFFICIAL COMMITTEE OF EQUITY  
 SECURITY HOLDERS OF USA CAPITAL FIRST TRUST DEED FUND, LLC, IN  
 SUPPORT OF USA CAPITAL FIRST TRUST DEED FUND, LLC'S OBJECTION TO  
 CLAIM NOS. 83, 84 AND 85 FILED BY THE PENSION BENEFIT GUARANTY  
 CORPORATION (AFFECTS DEBTOR USA CAPITAL FIRST TRUST DEED FUND,  
 LLC)**

1 **TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:**

2 The Official Committee of Equity Security Holders of USA Capital First Trust  
3 Deed Fund, LLC (the "FTD Fund Committee") appointed in the above-captioned bankruptcy  
4 cases (the "Chapter 11 Cases"), files this statement (the "Statement") in support of the "USA  
5 Capital First Trust Deed Fund, LLC's Objection to Claim Nos. 83, 84 and 85 Filed By the  
6 Pension Benefit Guaranty Corporation" (the "Objection") and respectfully represents as follows:

7 **I.**

8 **STATEMENT OF SUPPORT**

9 The FTD Fund Committee supports the Objection and urges the Court to disallow  
10 Claim Nos. 83, 84 and 85 (the "PBGC Claims") in their entirety, with prejudice.

11 **II.**

12 **BACKGROUND**

13 Under provisions of the Employee Retirement Income Security Act of 1974, as  
14 amended ("ERISA"), the sponsor of a defined benefit plan – commonly known as a pension plan  
15 – is required to fund the plan so that it can pay the benefits promised to employees under the  
16 terms of the plan.<sup>1</sup> Specifically, a plan sponsor is required to make minimum funding  
17 contributions to the plan<sup>2</sup> and, in addition, is required to pay certain statutory premiums to the  
18 Pension Benefit Guaranty Corporation ("PBGC").<sup>3</sup>

19 If a pension plan terminates and is underfunded at the time of termination, the  
20 sponsor of the pension plan is liable to the PBGC and/or the plan for unfunded benefit  
21 liabilities,<sup>4</sup> unpaid minimum funding contributions<sup>5</sup> and unpaid statutory premiums.<sup>6</sup> Liability  
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23 <sup>1</sup> ERISA § 302.

24 <sup>2</sup> ERISA § 302.

25 <sup>3</sup> ERISA § 4007.

26 <sup>4</sup> ERISA § 4062.

27 <sup>5</sup> ERISA § 302.

28 <sup>6</sup> ERISA § 4007.

1 extends not only to the plan sponsor but also to members of the sponsor's "controlled group."<sup>7</sup> A  
 2 "controlled group" consists of two or more entities under common control as defined in the  
 3 Treasury Regulations promulgated under Internal Revenue Code section 414(c).<sup>8</sup>

4           Entities are considered to be under common control for purposes of the Treasury  
 5 Regulations promulgated under Internal Revenue Code section 414(c) if they consist of either a  
 6 parent-subsidary group or a brother-sister group. A parent-subsidary group exists if a parent  
 7 entity owns an 80 percent or greater equity interest in one or more subsidiary entities.<sup>9</sup> In the  
 8 case of a subsidiary that is a corporation, equity interest is measured in terms of value of stock or  
 9 voting power of stock. In the case of a subsidiary that is taxed as a partnership, equity interest is  
 10 measured in terms of a percentage profits interest (i.e., a parent entity must own an 80 percent or  
 11 greater profits interest in the subsidiary partnership).<sup>10</sup> A brother-sister group exists if the same  
 12 or fewer persons own 50 percent or more of the equity interests in two or more entities.<sup>11</sup> If an  
 13 entity is a corporation, equity ownership is determined on the basis of voting power and value of  
 14 stock. If an entity is a partnership, equity ownership is determined on the basis of profits interest  
 15 in the partnership.<sup>12</sup>

16           Ownership of equity interests can be either direct or indirect<sup>13</sup>. For example,  
 17 consider a case where Corporation A owns 100 percent of the stock of both Corporation B and  
 18 Corporation C. Corporation B and Corporation C each own 50 percent of the stock of  
 19 Corporation D. Corporations A, B, C and D are deemed to constitute a parent-subsidary group  
 20 because Corporation A indirectly owns 100 percent of Corporation D's stock. Corporation A is  
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22 <sup>7</sup> See, e.g., ERISA § 4062(a).

23 <sup>8</sup> ERISA § 4001(14).

24 <sup>9</sup> Treas. Regs. § 1.414(c)-2(b)(2).

25 <sup>10</sup> Treas. Regs. § 1.414(c)-2(b)(C).

26 <sup>11</sup> Treas. Regs. § 1.414(c)-2(c).

27 <sup>12</sup> Treas. Regs. § 1.414(c)-2(c)(2).

28 <sup>13</sup> Treas. Regs. § 1.414(c)-4.

1 treated as owning 50 percent of Corporation D's stock because of its 100 percent ownership of  
 2 Corporation B and 50 percent because of its 100 percent ownership of Corporation C.

3 USA Commercial Mortgage Company ("USACM") is owned by Thomas A.  
 4 Hantges, Joseph Milanowski, Paul S. Hamilton, and Red Granite, LLC.

5 USA Capital First Trust Deed Fund, LLC ("FTDF") is owned by approximately  
 6 950 separate individuals and entities. USA Capital Realty Advisors, LLC ("USA Realty") is the  
 7 manager of FTDF and owns less than one-tenth of one percent of the FTDF.

8 USA Realty is owned by USA Investment Partners, LLC ("USA Investment"),  
 9 which, on information and belief, is owned by Joseph Milanowski, Paul Hamilton and TH Trust  
 10 (the Hantges Separate Property Trust).

### 11 III.

#### 12 **APPLICATION OF ERISA CONTROLLED GROUP RULES UNEQUIVOCALLY** 13 **DEMONSTRATE THAT FTDF IS NOT PART OF THE USACM CONTROLLED** 14 **GROUP, AND THEREFORE NOT OBLIGATED FOR THE PBGC CLAIMS.**

15 The PBGC has filed an estimated claim for unpaid minimum funding  
 16 contributions, a contingent claim for unfunded benefits liability and an unliquidated claim for  
 17 statutory premiums. It would appear from the PBGC's own description of its claims  
 18 ("estimated", "contingent", "unliquidated") that the PBGC is not actually sure it is owed any  
 19 money and is filing the claims on more or less a protective basis.

20 The PBGC's claims pertain to the USA Commercial Mortgage Defined Benefit  
 21 Pension Plan (the "Pension Plan"). The Pension Plan is sponsored by USA Commercial  
 22 Mortgage Company ("USACM"). Accordingly, the critical inquiry is whether FTDF and  
 23 USACM are part of a parent-subsidary group or a brother-sister group.

24 Neither USACM nor any other person or entity directly or indirectly owns 80  
 25 percent or more of the profits interests in FTDF. On the contrary, the profits interests in FTDF  
 26 are widely held (there are approximately 950 members who own profits interests) and no single  
 27 person or entity directly or indirectly owns as much as 25 percent of the profits interests.  
 28 Consequently, USACM and FTDF are not part of a parent-subsidary group.

A small overlap of indirect ownership exists between the owners of USACM and

1 FTDF. Specifically, as indicated in numbered paragraph 14 of the Declaration of Thomas J.  
 2 Allison In Support of FTDF's Objection to Proofs of Claim No. 83, 84, and 85, and DTDF's  
 3 Objection to Proofs of Claim No. 79, 80 and 81 Filed By the Pension Benefit Guaranty  
 4 Corporation (the "Allison Declaration"), USACM's equity is owned by Joseph Malinowski and  
 5 Thomas A. Hantges, Paul S. Hamilton and Red Granite, LLC. None of these entities or  
 6 individuals owns a profits interest in FTDF directly.

7 As further set forth in the Allison Declaration, at paragraph 14, USA Realty owns  
 8 less than one-tenth of one percent of the profits interests in FTDF. USA Realty is owned by  
 9 USA Investment Partners, LLC ("USA Investment"), which, upon information and belief, in turn  
 10 is owned by the TH Trust, Joseph D. Milanowski, and Paul Hamilton. Accordingly, under the  
 11 indirect ownership rules discussed above, the same 5 or fewer persons (namely, Joseph D.  
 12 Milanowski, Paul Hamilton, and arguably Thomas A. Hantges through the TH Trust (the  
 13 Hantges Separate Property Trust)) are treated as owning less than one-tenth of one percent of the  
 14 equity interests in USACM and FTDF for purposes of apply the brother-sister group rules. This  
 15 tiny quantum of cross-ownership falls far short of the 50 percent threshold that is required for the  
 16 existence of a brother-sister group. It follows that USACM and FTDF are not part of a brother-  
 17 sister group.

18 In summary, FTDF is neither part of a parent-subsidary group with USACM nor  
 19 is it part of a brother-sister group with USCM. This leads to the conclusion that FTDF is not a  
 20 member of USACM's controlled group and therefore is not liable for unfunded benefits liability,  
 21 minimum funding contributions or statutory premiums with respect to the Pension Plan.

#### 22 IV.

#### 23 CONCLUSION

24 For the reasons set forth herein, as well as in the Objection, the FTD Fund

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1 Committee requests that the Court grant the relief requested in the Objection and disallow the  
2 PBGC Claims against the FTDF.

3  
4 Respectfully submitted this 12th day of January, 2007.

5  
6 /s/ Eve H. Karasik

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